The Communications Decency Act § 230: Make Sense? Or Nonsense?--A Private Person's Inability to Recover if Defamed in Cyberspace

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INTRODUCTION

In the fall of 1998, an old fraternity buddy named “Tom” sent me an e-mail. “Tom” had taken on a new job developing web sites and decided to create a web site in recognition of “Ed,” another one of our fraternity brothers. “Ed” was our age but had been initiated into the fraternity the semester following our initiation. He was in the broadcast journalism program, thus he spent the bulk of his time working for the campus radio station and, consequently, never really became involved in fraternity events. “Ed” maintained a low profile and interacted with only select fraternity members, yet somehow, he managed to be the brunt of most of the fraternity jokes and stories. “Tom” felt that a web site featuring “Ed” would enlighten the world and allow people to experience the life of “Ed” that they would not have otherwise known. The e-mail, entitled “Important Announcement,” was sent to about fifteen fraternity members, and read:

Friends,

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1 American Communications Ass’n v. Douds, 339 U.S. 382, 442–43 (1950).
If you have any pictures, short stories, artifacts, etc. linked to Capt. “Ed” they are desperately needed. I feel the time has come to create a web site dedicated solely to the Capt. himself... an ode to The Dog. You will see him in his famous green shirt, be able to make a bad day better by looking at the Capt. dressed up like a seal or... tied up as a deushed [sic] Viking. Reminisce as you page through the countless stories people have wanted to share with the world. Current artifacts in the archives [include]:... ton’s [sic] of stories... if you have not heard about the car wash girl you have not lived... [.] Please send electronic images or stories to my e-mail. If you have pictures or other relics please send them.

On November 20, the web site was “launched.” The web site features stories about “Ed’s” alleged theft of another fraternity brothers sexual paraphernalia; a picture of “Ed” superimposed on a sailboat with a marijuana leaf as a mascot; a picture of “Ed” singing with Jerry Garcia; and other photos with captions reading “40,000 Bong Hits Later” and “High Times with Mary.” Soon after, e-mails regarding the web site began to pour in from other fraternity members applauding the web site.

Imagine being in “Ed’s” shoes right now. He is currently in the beginning stages of a promising career as a television reporter and yet has fallen prey to an apparently defamatory web site. How does he explain this website to an employer? What will his colleagues think if they see him “dressed up like a seal or tied up as a deushed [sic] Viking.”

“Ed’s” situation is very real. What “Tom” sees as a bit of witty humor could be absolutely devastating to “Ed’s” career.

With the newfound growth of cyberspace, anyone with access to a computer can defame a person and, almost instantaneously, put a career in jeopardy.

Is this really a problem? After all, “Ed” could probably bring a defamation action against “Tom” and the interactive service provider. Shouldn’t they be liable for publishing such an

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2 The e-mail from “Tom” announcing the web site read: “Untie the ropes, raise the sails, and christen the ship. ‘Captain Ed’s Cruise Lines’ is open for business. Enjoy.”

3 One of the e-mails read as follows: “[Tom], Pure genius. You’re going to make a star out of this guy. The buzz here in Washington is already growing... [T]he captain will be global in days, if not hours... Just picture Tim Russert trying to interview ‘Ed’ on MSNBC.”

4 One person wrote: “[Toml, on your new endeavor... I have never been so confused about something in my whole life.”
outrageous web site for the millions of Internet subscribers to see? Unfortunately, defamation law in cyberspace has many glitches and allows little opportunity to recover in a defamation action.

This Note will delve into a private person's ability, or lack thereof, to recover for defamatory statements made about his or her persona over the Internet. Part I will briefly synopsize the elements that a person must prove to recover in a defamation action and will lay out the historical setting that has brought defamation law in cyberspace to its present status. Part II will analyze the effect of the recent Communications Decency Act on a private person's ability to recover if defamed on the Internet. Emphasis will be placed on the position that the current state of defamation law in cyberspace precludes private persons from recovery. This Note concludes that the Communications Decency Act does a great disservice to private individuals harmed by defamation on the Internet by foreclosing adequate legal remedies.

I. THE BLUEPRINT FOR A DEFAMATION CAUSE OF ACTION

A. The Prima Facie Case in Defamation

The first step to recovery in a defamation action is to show that the alleged statements are in fact defamatory. In today's society, there are many definitions of what constitutes a libelous statement, but most scholars agree that a defamatory statement is "[any written or printed words which tend to lower a person in the estimation of right-thinking men, or cause him to be shunned or avoided, or expose him to hatred, contempt, or ridicule." In

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5 See ELLA COOPER THOMAS, THE LAW OF LIBEL AND SLANDER 5 (1973): The first necessary element to the action of [defamation] is the insulting statement, written printed or expressed in any manner... such as by signs, gestures, pictures, effigies and the like, which from its usual meaning and understanding, has a tendency to injure a person's reputation either in his personal life, or in his business, trade or profession, or which tends to blacken the memory of one who is dead or publishes the natural defects of a living person.

6 LAWRENCE H. ELDREDGE, THE LAW OF DEFAMATION 32 (1978) (quoting GATLEY, LIBEL AND SLANDER 16 (5th ed. 1960)); see also RESTATEMENT (FIRST) OF TORTS § 559 (1939) (stating that a statement is defamatory if "it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him").
practice, however, jurisdictions vary as to what degree a statement must injure a person's reputation for it to qualify as defamatory. Most jurisdictions agree that a statement that is merely "unflattering, annoying, irksome, or embarrassing, or that hurts only the plaintiff's feelings," does not give rise to an actionable claim.

Defamatory statements alone, however, will not support a personal recovery. Publication of the defamatory statement to a third party is an essential element of a defamation action. The

E. DOUGLAS HAMILTON, LIBEL: RIGHTS, RISKS, RESPONSIBILITIES 6 (1966), the authors define libel as:

A malicious publication, by writing, printing, picture, effigy, sign or otherwise than by mere speech, which exposes any living person, or the memory of any person deceased, to hatred, contempt, ridicule or obloquy, or which causes, or tends to cause any person to be shunned or avoided, or which has a tendency to injure any person, corporation or association or persons, in his or their business or occupation . . . .

7 See ROBERT D. SACK & SANDRA S. BARON, LIBEL, SLANDER, AND RELATED PROBLEMS 69 (2d ed. 1994); see also Kimmerle v. New York Evening Journal, Inc., 186 N.E. 217, 218 (N.Y. 1933) (stating that defamatory statements are words which "tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society"). But cf. Newell v. Field Enters., Inc., 415 N.E.2d 434, 441 (Ill. App. Ct. 1980) ("No general rule or principle constitutes an accurate test for determining whether language is defamatory; each case must be decided on its own facts.").

8 SACK & BARON, supra note 7, at 69 (construing Pierce v. Capital Cities Communications, Inc., 576 F.2d 495, 503-04 (3d Cir. 1978)).

9 See Wainman v. Bowlar, 576 P.2d 268, 271 (Mont. 1978) (stating that "[i]t is not sufficient, standing alone, that the language is unpleasant and annoys or irks him, and subjects him to jests or banter, so as to affect his feelings"); Scott-Taylor, Inc. v. Stokes, 229 A.2d 733, 734 (Pa. 1967) ("It is not enough that the victim of the slings and arrows or outrageous fortune, be embarrassed or annoyed, he must have suffered that kind of harm which has grievously fractured his standing in the community of respectable society.") (internal quotations omitted); Cox v. Hatch, 761 P.2d 556, 561 (Utah 1988) ("A publication is not defamatory simply because it is nettlesome or embarrassing to a plaintiff, or even because it makes a false statement about the plaintiff."). In Chapin v. Greve, 787 F. Supp. 557 (E.D. Va. 1992), aff'd, Chapin v. Knight-Ridder, Inc., 993 F.2d 1087 (5th Cir. 1993) the court stated:

To defame a person is to attack his or her good name, thereby injuring his or her reputation. But not every unflattering or unwelcome remark will sustain a libel suit. To be defamatory as a matter of law, a statement must be more than merely unpleasant or offensive; it must make the plaintiff appear odious, infamous, or ridiculous.

Id. at 562 (internal quotations and citations omitted).

10 See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113 (5th ed. 1984); see also 8 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 29:5 (1991). Courts require publication to a third person an essential ele-
Restatement establishes that the publication of a defamatory matter is a "communication intentionally or by a negligent act to one other than the person defamed." A person has the power to think, write, and speak "outrageous contrived accusations" about another and may share such statements with the people about whom they are thinking without incurring liability for defamation. As soon as these thoughts are expressed to a third person, however, the creator is exposed to liability for defamation. It is the "damage done to character in the opinion of other men, and not a party's selfestimation [sic]," that establishes the material element in a defamation action.


11 RESTATEMENT (SECOND) OF TORTS § 577 (1965).

12 Id.; see also Beauvoir, 484 N.E.2d at 845 (finding that the statement must be communicated to a third party); CHARLES ANGOFF, THE BOOK OF LIBEL 8 (1966) ("A libel, to be actionable, must first of all be 'published,' that is, written or printed in language or drawing and transmitted to a third person or so transmitted or exposed that a third person might see it.").

13 SACK & BARON, supra note 7, at 121; see also JOHN TOWNSHEND, SLANDER & LIBEL 84 (4th ed. 1890) (finding that there cannot be a publication unless the other person understands the significance of the language sought to be communicated).

14 See SACK & BARON, supra note 7, at 121 (stating that "[m]erely thinking such thoughts, writing them down, or sharing them only with their unhappy object cannot possibly injure the latter's reputation, so no defamation can result"); see also PHELPS & HAMILTON, supra note 6, at 13 (explaining that without publication to a third party, thoughts alone will not subject an individual to liability for defamation).

15 See Ellis v. Safety Ins. Co., 672 N.E.2d 979, 984 (Mass. App. Ct. 1996) (holding there was no liability where the plaintiff failed to put forth evidence that the defendant's allegedly false and defamatory statement was expressed to a third party). A plaintiff need not prove that the statement was conveyed to the public at large. The requirement of publication will be satisfied if the defamatory words are communicated to just one other person. See Fiore v. Rogero, 144 So. 2d 99, 102 (Fla. Dist. Ct. App. 1962); Toomer v. Breau, 146 So. 2d 723, 726 (La. Ct. App. 1962); Brauer v. Globe Newspaper Co., 217 N.E.2d 736, 739 (Ma. 1966); Ostrowe v. Lee, 175 N.E. 505, 507 (N.Y. 1931); Hedgpeth v. Coleman, 111 S.E. 517, 519 (N.C. 1922); Rickbeil v. Grafton Deaconess Hosp., 23 N.W.2d 247, 251 (N.D. 1946); Lindley v. Delman, 26 P.2d 751, 754 (Okla. 1933).

16 Sheffill v. Van Deusen, 79 Mass. 304, 305 (1859); see also Belli v. Orlando Daily Newspapers, Inc., 389 F.2d 579, 585 (5th Cir. 1968) ("Since one's reputation is the view which others take of him...[whether an idea injures a person's reputation depends upon the opinions of those to whom it is published."); Tumbarella v. Kroger Co., 271 N.W.2d 284, 289 (Mich. 1978) ("A communication is defamatory if it tends to harm an individual's reputation so as to lower him in the estimation of the community or deter others from associating with him."); Church of Scientology v.
In a 1964 landmark decision, the United States Supreme Court addressed the role of the First Amendment in defamation actions. In *New York Times Co. v. Sullivan*, the Court stated, "constitutional guarantees require ... a federal rule that prohibits a public official from recovering damages for a defamatory falsehood ... unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." This holding, however, was limited to public officials.

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17 See SPEISER ET AL., supra note 10, § 29:5; see also CLIFTON O. LAWHORNE, THE SUPREME COURT AND LIBEL 26 (1981) (explaining that the Court's decision in *New York Times* was an attempt to "bring order and cohesion to the jurisprudence of libel"). The decision in essence, had "issued a new character of freedom to allow people to make misstatements of fact in even scandalous, contemptuous criticism of public officials." Id. The decisions made the free speech and press guarantees provided for in the First Amendment of the United States Constitution binding on the states through the Fourteenth Amendment. See id. See generally Samuel R. Pierce, Jr., The Anatomy of An Historic Decision: *New York Times Co. v. Sullivan*, 43 N.C. L. REV. 315, 315 (1965) (stating that "New York Times Co. v. Sullivan [was] a landmark decision in the law of libel and in the field of civil liberties") (footnote omitted); Frank H. Warnock, The New York Times Rule—The Awakening Giant of First Amendment Protections, 62 KY. L.J. 824, 827 (1974) (discussing how the decision was like a "bombshell" that stunned the legal world).


19 Id. at 279–80; see also W. WAT HOPKINS, ACTUAL MALICE: TWENTY-FIVE YEARS AFTER TIMES V. SULLIVAN 92–94 (1989) (explaining that although the term "actual malice" has been criticized, the term was stated seventeen times in the Court's opinion to mean "reckless disregard or knowledge of falsity"); LAWHORNE, supra note 17, at 27–29 (explaining that the Court's decision had the immediate effect of bringing the First Amendment into the "picture" to encourage free debate in the press). See generally Michael J. Rubin, Torts-Defamation-constitutional Requirement of Actual Malice, 14 AM. U. L. REV. 71 (asserting that the Court, in requiring actual malice in defamation actions against public officials trumped the majority of state libel laws and impliedly rejected the consensus of scholarly opinion).

20 See *New York Times*, 376 U.S. at 283 ("The Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct."); see also HOPKINS, supra note 19, at 29–30. See generally Arthur L. Berney, Libel and the First Amendment—A New Constitutional Privilege,
In *Gertz v. Robert Welch, Inc.*, the Court held that states could individually define the requisite fault standard that a private person must establish to prove a prima facie case in defamation. States could not impose strict liability, but could define for themselves the appropriate fault standard for a publisher or broadcaster of defamatory material that injures a private person. The Court also stated that, "the competing values at stake in defamation suits by private individuals allow[] the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times*." "

Under *Gertz*, states remain free to choose varying fault standards as long as they require a minimum showing of negligence. Generally, states have adopted one of three different

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51 VA. L. REV. 1, 47 (1965) ("[T]he Supreme Court seems to have made an unmistakably correct decision in extending the immunity to defamatory statements about public officials to misstatements of fact.").

In subsequent decisions, the Supreme Court "interpreted, extended, and clarified" the rule. *Speiser et al.*, supra note 10, § 29:16; see also *Curtis Pub'g Co. v. Butts*, 388 U.S. 130, 155 (1967) ("We consider and would hold that a 'public figure' who is not a public official may also recover damages for a defamatory falsehood."). In *Curtis Publishing*, Justice Warren, in a concurring opinion, stated that the "*New York Times* standard is an important safeguard for the rights of the press and the public to inform and be informed on matters of legitimate interest." *Id.* at 164–65. Justice Warren also believed that in "cases involving 'public men'—whether they be 'public officials' or 'public figures,'" the actual malice standard "would afford the necessary insulation for the fundamental interests which the First Amendment was designed to protect." *Id.* at 165. This standard of actual malice is not based on what a reasonably prudent man would investigate before publishing the material. See *St. Amant v. Thompson*, 380 U.S. 727, 731 (1969). Instead, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.*


22 See *id.* at 347.

23 See *id.*; see also *Lawhorne*, supra note 17, at 84 (explaining that, as a matter of policy, private persons are "more deserving of recovery than public people because they do not seek public scrutiny and do not relinquish interest in the protection of their good names"). See generally *Rosanova v. Playboy Enters.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976), aff'd, *Rosanova v. Playboy Enters.*, 580 F.2d 859 (5th Cir. 1978) (explaining that trying to distinguish between a public official and a private individual is like "trying to nail a jellyfish to the wall").

24 *Gertz*, 418 U.S. at 348.

25 See generally *Lawhorne*, supra note 17, at 89 (discussing *Gertz* and the wisdom of leaving the states to determine the requisite level of fault); see also *Jones v. Taibbi*, 512 N.E.2d 260, 269 (Mass. 1987) (finding that a reporter was negligent in publishing a story about the plaintiff where the reporter had reason to doubt the veracity of the story and there were inconsistencies surrounding the facts).
fault standards. The majority of states follow the negligence standard, at least one state has adopted a gross irresponsibility standard, and a minority of states have adopted the New York Times standard of actual malice.

Regardless of what fault standard applies, liability may not be predicated upon publication of a truthful statement. The plaintiff has the burden of proving the falsity of the published material. Furthermore, a plaintiff will not be able to recover punitive damages without a showing of actual malice.

Therefore, when a plaintiff proves a defamatory statement, fault, and falsity, the plaintiff has made a prima facie case in

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30 See Philadelphia Newspapers Inc. v. Hepps, 475 U.S. 767, 776 (1986). See generally RANDALL P. BEZANSON, LIBEL LAW AND THE PRESS: MYTH AND REALITY 220 (1987) (stating that although “a determination of falsity is not a constitutional precondition to liability in all libel actions today, courts are increasingly mandating it, and the Supreme Court has required it in most media cases”).

31 See SPEISER ET AL., supra note 10, § 29:130; see also Gertz v. Robert Welch Inc., 418 U.S. 323, 350 (1974) (finding that “jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship,” thus a plaintiff must first prove actual malice to recover punitive damages); Hansen v. Stoll, 636 P.2d 1236, 1241 (Ariz. Ct. App. 1981) (stating that “[w]here actual malice is shown, the jury may also award punitive damages”); McHale v. Lake Charles Am. Press, 390 So. 2d 556, 569 (La. Ct. App. 1980) (finding that a plaintiff may be awarded punitive damages and reasonable attorneys fees “if it is proved the defamatory...statement on which the action is based was made with knowledge of its falsity or with reckless disregard of whether it was false or not”) (citation omitted); Roche v. Egan, 433 A.2d 757, 764 (Me. 1981) (same); Stuempeges v. Parke, Davis & Co., 297 N.W.2d 252, 259 (Minn. 1980) (same).
defamation and the case should reach the jury on the issue of damages.\textsuperscript{32}

\textbf{B. The Split in the Courts}

So, what is the problem? Reconsider "Ed's" situation. Since "Tom" developed the web page, "Ed" could sue "Tom" in defamation provided he can prove the essential elements. A problem arises, however, if "Tom's" identity is unknown. Does "Ed" have a cause of action against the Internet service provider? Is the Internet provider a publisher or merely a distributor of information? Until early 1996, this debate revolved around two court opinions that reached opposite conclusions.

In \textit{Cubby, Inc. v. CompuServe Inc.},\textsuperscript{33} the plaintiffs, Cubby Incorporated and Robert Blanchard, developed "Skuttlebut," a computer database system designed to publish and distribute electronically various news and gossip stories.\textsuperscript{34} "Skuttlebut" was created to compete with "Rumorville," a similar database that existed on CompuServe.\textsuperscript{35} Plaintiffs claimed that "Rumorville" had published false and defamatory statements about the plaintiffs and that CompuServe carried those statements in its Journalism Forum.\textsuperscript{36} The allegedly defamatory remarks included statements that described Skuttlebut as a "'new start up scam;'"\textsuperscript{37} explained that "Blanchard was 'bounced' from his previous employer;"\textsuperscript{38} and proclaimed that "Skuttlebut gained access to information first published by 'Rumorville' 'through some back door.'"\textsuperscript{39} CompuServe's motion for summary judgment alleged that it was merely a distributor of "Rumorville" and thus, was not liable in defamation because it did not know, or have reason to know, of the allegedly defamatory statements.\textsuperscript{40} Cubby contended that CompuServe was a publisher.\textsuperscript{41}

\textsuperscript{32} See \textit{RESTATEMENT (SECOND) OF TORTS} § 620 (1965) (explaining that if one is liable for defamation, the person defamed is at least entitled to nominal damages).


\textsuperscript{34} See id. at 138.

\textsuperscript{35} See id.

\textsuperscript{36} See id.

\textsuperscript{37} \textit{Id.} (citation omitted).

\textsuperscript{38} \textit{Id.}

\textsuperscript{39} \textit{Id.}

\textsuperscript{40} See id. at 138–39.

\textsuperscript{41} See id. at 139.
Judge Leisure, of the Southern District of New York, granted CompuServe's motion for summary judgment. In its opinion, the court analogized CompuServe to an "electronic, for-profit library." The court found that once CompuServe decided to carry a publication, it had "little or no editorial control over that publication's contents." Thus, the court held that CompuServe was a distributor of the information yet not liable since it did not know or have reason to know of the defamation.

Four years later, in Stratton Oakmont, Inc. v. Prodigy Services Co., a New York State court addressed the issue of whether an Internet service provider should be treated as a publisher or distributor when a third party posts defamatory remarks on an electronic bulletin board maintained by the provider. This time, however, Justice Ain, of the New York Supreme Court, held that the Internet service provider was a publisher rather than a distributor.

Plaintiff, Stratton Oakmont, a securities investment banking firm, sued Prodigy in the defamation action asserting that Prodigy was a publisher of allegedly libelous statements. Prodigy operated a bulletin board called "Money Talk." An anonymous user posted a message on "Money Talk" claiming that one of plaintiff's securities offerings was a "major criminal fraud," that the President of Stratton Oakmont was "soon to be proven criminal," and that "Stratton was a 'cult of brokers who either lie for a living or get fired.'" In his opinion, Justice Ain agreed with the plaintiff and held that Prodigy was a publisher, not a distributor, of the newsletter.
The court went through "great pains to distinguish Prodigy from Cubby." Ultimately, the decision rested on the fact that Prodigy, unlike CompuServe, had exercised considerable editorial control over the content of its bulletin boards.

The seemingly opposite holdings of these two cases lend themselves to confusion when determining whether an Internet provider acted as a publisher or distributor. On the one hand, a federal court held that Internet providers would be isolated from liability if they participated in a "hands off" approach and re-

51 See id. at *4.
52 Fia F. Porter, Note, Defamatory Speech on the Internet: "Dish" Best Served Chilled?, 41 N.Y.L. SCH. L. REV. 731, 745 (1997); see also Stratton Oakmont, 1995 WL 323710, at *4 ("The key distinction between CompuServe and PRODIGY is two fold. First, PRODIGY held itself out to the public and its members as controlling the content of its computer bulletin boards. Second, PRODIGY implemented this control through its automatic software screening program . . . .").
53 See Stratton Oakmont, 1995 WL 323710, at *3. See generally Porter, supra note 52, at 745 (stating that "[t]he gravaman of the Prodigy analysis is editorial control").
54 See Siderits, supra note 46, at 1080 (explaining that "[i]n the wake of the decision in the Stratton-Prodigy lawsuit, courts in this country could classify commercial on-line services as either publishers or distributors; there is now precedent to support both determinations"). See generally Marc Jacobson, Prodigy: It May Be Many Things to Many People, But, It Is Not A Publisher for Purposes of Libel, and Other Opinions, 11 ST. JOHN'S J. LEGAL COMMENT. 673, 674 (1996) (explaining that in deciding liability in defamation actions, "[t]he landscape is a mess, and the trail signs are pointing in many different directions"). To further the complications, the Vice President of General Counsel for Prodigy has said that in apportioning liability to Internet providers, it must be recognized that Internet providers take on various different roles. See id. at 675. In a speech he said:

We [Internet providers] are the Post Office: we deliver millions of messages by E-mail every day, and I do mean millions. We are the telephone company: we link people in real time chat, with instant messaging and with real time voice coming on strong as well, much to the chagrin of the telephone companies. We are the town square: we allow people to voice their opinions in free flowing bulletin boards. We are the library: we assemble interesting Internet content by subject, connecting that content through hyper links, which can be called the Internet's Dewey Decimal System, or a speed dial connection or any one of a number of a things. Finally, we are [a] straight pipe: we link people directly to the Internet where they go out into cyberspace and they perform a variety of different tasks.

Id. (footnotes omitted).
55 James E. Stewart & Laurie J. Michelson, Cyberspace Defamation, 75 MICH. B.J. 510, 512 (1996) (warning that although "many . . . providers pride themselves on making bulletin boards available without virtually any restrictions . . . , it is perhaps a risky course for these providers to conclude . . . that [such a] policy will automatically insulate them from defamation liability").
frained from editing the content of their services. It would not seem fair to hold a company liable in defamation merely for attempting to control the amount of profane language that reached its subscribers. On the other hand, a New York court applied the common-law distinction between publisher and distributor that had existed for years. Specifically, an Internet provider would be held liable if it had knowledge that the material was defamatory.

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56 See Lunney v. Prodigy Servs. Co., 250 A.D.2d 230, 237 (N.Y. App. Div. 2d Dep't 1998) (stating that the Stratton Oakmont decision encourages providers to ignore content of bulletin boards when providers should be encouraged to protect users); Porter, supra note 52, at 745 (stating that the Prodigy decision “may have the undesirable effect of encouraging on-line service providers to ‘eschew’ creating any guidelines whatsoever for their services, lest they invite liability”).

57 See Lunney, 250 A.D.2d at 237 (stating that one of the court's reasons for not following Stratton Oakmont was out of “consideration of fairness”); Siderits, supra note 46, at 1080 (suggesting that it is unfair to hold Internet service providers to a higher standard simply because they hold themselves “out as a family oriented service,” thus, “subject[ing] incoming messages to screening software”). Furthermore, if the courts were to treat Internet providers as publishers, then in essence, all providers would be “faced with the Herculean task of reading through each and every posting sent to their bulletin boards or developing a screening system that could distinguish between defamatory speech and other types of speech.” Id. at 1081. Clearly, this would be an unreasonable burden on Internet providers. See Lunney, 250 A.D.2d at 236 (stating that “it is clear . . . that a service provider such as Prodigy cannot screen all of the e-mail sent by its subscribers”); Jacobson, supra note 54, at 677 (explaining that Prodigy's only screening mechanism was the “George Carlin screener” which would only filter out “the seven dirty words”). As noted by the Lunney court, this type of “unintelligent automated word-exclusion program . . . cannot be equated with editorial control.” Lunney, 250 A.D.2d at 235.

58 See Lunney, 250 A.D.2d at 235 (noting that even if Internet providers were publishers, to be liable there would have to be a showing of knowledge of falsity); R. James George, Jr. & James A. Hemphill, Defamation Liability and the Internet, 507 PRAC. L. INST. 691, 694 (1998) (“The ‘publisher/distributor’ distinction has existed for years in the common law of libel.”).

59 See Lunney, 250 A.D.2d at 236; Siderits, supra note 46, at 1080 (suggesting that future courts that were faced with this decision ought to rule that the on-line providers are distributors and entitled to protection from liability from its users). Moreover, it would seem logical that considering the “vast volume of cyber-communication,” Internet service providers ought to be held liable only where they know or have reason to know of the defamatory statements. Id. See generally EVERETTE E. DENNIS & ELI M. NOAM, THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS 21–41 (1989) (discussing the issues to consider in delegating liability in defamation actions).
The Common Law Distinction Between Publisher and Distributor

At common-law: "A publisher (such as a newspaper, magazine, television network, or book publisher) typically has the power to exercise control over what is distributed in its publications; it can publish, edit, or decline to distribute the speech of its agents or employees based on the [content] of that speech." Therefore, since a publisher exercises control over what is distributed, it has an obligation to monitor the content of its publications. A distributor (like a bookstore or newsstand), however, is not expected to monitor the content of every book or magazine it sells. Therefore, it should not be subject to liability unless it is on notice that one of its offerings contains false and defamatory material. If notice is established, liability exists because the distributor "essentially becomes a typical 'publisher.'"

Recall "Ed's" situation. If he placed the Internet service provider on notice of the defamatory web page and the provider then failed to remove it, the provider would then seemingly be considered a publisher, and thus, subject to liability. The Cubby court recognized this logic but concluded that the plaintiffs had failed to put forth any specific facts establishing a genuine issue as to whether CompuServe knew, or had reason to know, of "Rumor-
ville's" contents. After Cubby, there appeared to be little substantive change in defamation law and "Ed" would have a strong case for recovery.

II. THE GOVERNMENT ENACTS "VIRTUAL IMMUNITY" LEGISLATION

A. The Communications Decency Act of 1996

Defamation issues in cyberspace changed dramatically in 1996 when Congress enacted the Communications Decency Act. Congress found that the rapidly expanding availability of Internet services offered individuals greater opportunities to access educational and informational resources. Congress stated that the Internet presented a "forum for true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." Furthermore, Congress

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66 See id. at 141.
67 See 47 U.S.C. § 223 (1994 & Supp. III 1997). See generally John Schwartz, Coalition to File Suit Over Internet Rules: Action Targets New Law as Unconstitutional, WASH. POST, Feb. 26, 1996, at A4 (explaining that the Communications Decency Act was signed by President Clinton in February in order to prevent the display of "'patently offensive' materials via computer in a way that minors might see them"). Shortly after its enactment, the Communications Decency Act was criticized as limiting the materials available on-line to only those materials that were suitable for young children. See id. But cf. Reno v. American Civil Liberties Union, 521 U.S. 844, 861 (1997) (finding that in its attempt to deny minors access to potentially harmful speech, the CDA unconstitutionally "suppresses a large amount of speech that adults have a constitutional right to receive").
68 See 47 U.S.C. § 230(a)(1) (Supp. III 1997) (finding that "[t]he rapidly developing array of Internet and other interactive computer services available to individual Americans represent[s] an extraordinary advance in the availability of educational and informational resources to our citizens"). But see Jon D. Markman, Internet Eroticist Feels Exposed, L.A. TIMES, Apr. 1, 1996, at A1 (describing one "pornographer" who feared the CDA would have the effect of putting his "pay-to-view" Internet sites out of business); Leslie Miller, Congress in Cyberspace: Internet Caucus Aims to Bring Legislators Up to Speed, USA TODAY, Mar. 28, 1996, at D6 (explaining that Senator Exon, who sponsored the CDA, did not even own a computer and that many of the Congressional members that voted on the CDA were not "up to speed" with how the Internet operates); Leslie Miller, New Federal Indecency' Law May Silence All Online Chat, AOL Says, DETROIT NEWS, Apr. 4, 1996, at C5 (explaining that if the CDA is upheld, the net effect may be to force Internet providers to shut down chat rooms in order to protect children from "indecent" materials). See generally Reno v. American Civil Liberties Union, 521 U.S. 844 (1997) (finding sections of the CDA unconstitutional, and therefore allowing Internet providers to retain chat rooms).
69 47 U.S.C. § 230(a)(3). But see Joel Dresang, Cyberporn On-line Limits Assailed Families Say Anti-porn Act Reeks of Censorship, MILWAUKEE J. SENTINEL, Mar. 25, 1996, at A1 (explaining that the Internet is an excellent medium for educa-
found that people were relying on the Internet as a medium for political and educational discourse. As a result, Congress sought to enact legislation that would promote the development of the Internet and would concomitantly preserve the "vibrant and competitive free market" for Internet providers.

To achieve these goals, Congress enacted section 230 of the Communications Decency Act. This legislation consisted of two provisions that had a considerable effect on defamation law in cyberspace. The first provision, section 230(c)(2), states:

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, har-
assing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material . . . .

This section overruled Stratton Oakmont v. Prodigy, so that today, when Internet providers implement software-screening programs designed to filter out distasteful material, they will not be treated as participating in decisions that "constitute editorial control." Essentially, section 230(c)(2) encouraged Internet providers to take measures to protect children from pornographic and grotesque material. Some commentators consider this legislation to be largely the result of lobbying efforts by Internet providers. After Stratton Oakmont, Internet providers were

74 Id. at § 230(c)(2).

75 See Robert Cannon, The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway, 49 FED. COMM. L.J. 51, 57-65 (1996) ("In the Conference Report, the conferees specifically stated that they were overturning Stratton."). S. CONF. REP. NO. 104-230 (1996) states:

This section provides 'Good Samaritan' protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material. One of the specific purposes of this section is to overrule Stratton Oakmont v. Prodigy and any other similar decisions which have treated such providers and users as publishers or speakers of content that is no their own because they have restricted access to objectionable material.

Id. at 435.


77 See Cannon, supra note 75, at 57-65 (explaining the need to control the proliferation of the pornography industry and the easy access to pornography by children).

78 See Federal Filings Newswires, Supreme Court Won't Hear Defamation Case vs. AOL, June 22, 1998 (explaining that section 230 was enacted to keep government interference with Internet providers at a minimum); see also Robert W. Hamilton, Liability for Third-Party Content on the Internet, 8 SETON HALL CONST. L.J. 733, 743 (1988) (explaining how millions of dollars are being spent on lawyers and lobbyists in an attempt to "hash out on Capitol Hill" the obligations that should be imposed on Internet providers). See generally Steven R. Salbu, Who Should Govern the Internet?: Monitoring and Supporting a New Frontier, 11 HARV. J.L. & TECH. 429 (1998); see also Jeff Magenau, Setting Rules In Cyberspace: Congress's Lost Opportunities to Avoid the Vagueness and Overbreadth of the Communications Decency Act, 34 SAN DIEGO L. REV. 1111, 1136 (1997) (explaining that Congress's desire in enacting the CDA seems to suggest that Congress was seeking to please everybody by using broad terminology); Vikas Arora, Note, The Communications Decency Act: Congressional Repudiation of the "Right Stuff," 34 HARV. J. ON LEGIS. 473, 512
looking at a "lose-lose situation." If they were to participate in any control over the content of their services, they were essentially sitting ducks for enormous liability. It is doubtful, however, that these Internet corporations were truly willing to relinquish all editorial control over their services. Under the guise of needing to protect the children from pornographic material, Internet providers lobbied for legislation that would allow them to regain editorial authority of content while still shielding themselves from tort liability.

Unfortunately, Internet providers may not be engaged in protecting children from pornography any more than they were under *Stratton Oakmont*. In fact, some believe Internet providers have left the responsibility of protecting children from pornographic material to parents and families. Parental intervention, however, cannot fully solve the problem.

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79 Siderits, *supra* note 46, at 1080 (suggesting that as a result of two opinions, Internet providers were faced with difficult decisions—they could have opted to "institute very strict standards to prevent any such defamatory language from reaching the bulletin boards," or they could have "take[n] a totally hands-off approach in order that it appear to have no editorial control whatsoever, so as to fall under the auspices of a distributor rather than a publisher").


83 See Miller, *supra* note 82, at D6 (stating that "[o]n-line services . . . let parents customize their own computers to block Internet areas they consider inappropriate for their children"). See generally Microsoft Launches An Effort to Filter On-Line Material, *Wall St. J.*, Feb. 29, 1996, at B3 (discussing an on-line filtering system that would rate web sites for their level of sexual content, nudity, and profanity and allow parents to control the level of adult content web sites that their children could access); see also Buckley, *supra* note 71, at B3 (stating that "there can't be any assurance that the horny 16-year-old isn't going to succeed in tapping [into pornographic material]"). Some parents, however, felt that it was insulting for Congress to assume
The second provision that significantly affects cyberspace and defamation law is section 230(c)(1). This section mandates: "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Furthermore, the statute requires that no provider "shall be treated as the publisher or speaker of any information provided by another information content provider." Essentially, "information content provider" may be considered the public, business, or entity that is feeding information to the Internet companies of the world. As a result of the 1996 Communications Decency Act, on-line companies cannot be treated as a "publisher or speaker" of any information provided by third parties. Thus, the impact of this legislation is to eliminate virtually all liability in defamation actions where the plaintiff alleges that the on-line company is a publisher. Moreover, since Internet service providers will not be treated as a publisher, it is impossi-

that parents were not capable of monitoring the activities of their children. See, e.g., Miller, supra note 82, at D6. See generally Erznoznik v. Jacksonville, 422 U.S. 205 (1975) (sustaining a challenge to a city ordinance that prohibited drive-in movie theaters from showing films containing nudity).


Id.

See id. § 230(e)(2) (defining interactive computer service as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions").

Id. § 230(c)(1).

See id. § 230(e)(3) (defining information content provider as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service").

See Zeran v. America Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997) (finding Internet providers immune from liability in defamation actions where the defamatory material was posted by a third party), cert. denied, 118 S. Ct. 2341 (1998); see also Carl S. Kaplan, Libel Suit Against Drudge Highlights Online Liability, STAR-TRIB. (Minneapolis-St. Paul), Mar. 29, 1998, at D10 (explaining that it was Congress's intent to draw a "bright line" of immunity around online service providers where the defamatory material is provided by a third party). Although no cases have been decided in this area, there is still a possibility that an Internet provider would be liable for defamatory information of which they were the creators. See id. (noting that if an online service was "100 percent responsible for the creation of defamatory information, then it [probably] would not have immunity under [section 230]").
ble to satisfy the element of publication necessary to establish a prima facie case in defamation.\textsuperscript{90}

The effect of section 230(c)(1) seems ludicrous when closely analyzed. Consider the following situation: A person learns that they are being defamed over the Internet by an anonymous third party.\textsuperscript{91} This person contacts the customer relations department of his or her Internet provider to inform it of the situation and to ask that it remove the defamatory material.\textsuperscript{92} At this point, the Internet provider has been placed on notice of the defamatory material and ought to have some incentive to act promptly to remove it.\textsuperscript{93} It would appear that notifying the customer relations department would, for purposes of defamation liability, place the Internet provider in a position similar to that of a library or bookstore.\textsuperscript{94} Like a library or bookstore, the Internet provider is a conduit of vast amounts of information, but rarely serves as the creator of the information they provide.\textsuperscript{95} Comparable to libraries or bookstores, Internet service providers have little, if any, editorial control over the services they provide. If a bookstore or library is put on notice that they are carrying defamatory material, however, they must act promptly to remove it.\textsuperscript{96} Similarly, it

\textsuperscript{90} See Speiser et al., supra note 10, at § 29:5 (stating that “[p]ublication of the asserted defamatory material is an absolute sine qua non to any successful prosecution of an action, claim or cause of action for [defamation]”).

\textsuperscript{91} See Keith Siver, Good Samaritans in Cyberspace, 23 Rutgers CompuServe & Tech. L.J. 1, 24 (1997) (suggesting producers of information online are largely anonymous, unlike information producers in traditional mediums). The availability of user anonymity also provides little incentive for information providers to exercise care in providing information. See id. This combination—anonymity and little incentive to exercise due care—“signifies a greater threat of reckless and unlawful use in the online medium than in other mass media forms.” Id.

\textsuperscript{92} See Zeran, 129 F.3d at 329 (discussing a similar fact pattern).

\textsuperscript{93} See Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135, 141 (S.D.N.Y. 1991) (finding that an online provider would be liable for defamation if it knew or had reason to know that the material was defamatory).

\textsuperscript{94} See Kean J. DeCarlo, Note, Tilting at Windmills: Defamation and the Private Person in Cyberspace, 13 Ga. St. U. L. Rev. 547, 556 (1996) (explaining that most commentators analogize the “computer media to informational distributors such as libraries and bookstores with limited liability as secondary publishers”). This analogy seems appropriate because Internet providers generally do not exercise control over the content of the material. See id.

\textsuperscript{95} See Siver, supra note 91, at 25 (explaining that online traffic is vast, instantaneous, and too voluminous to monitor).

\textsuperscript{96} See Symposium, Panel II: Indecency on the Internet: Constitutionality of the Telecommunications Act of 1996, 7 Fordham Intell. Prop., Media & Ent. L.J. 463, 502 (1997) (explaining that in order to protect against the self-censorship that would result if bookstores or libraries were forced to inspect the content of all of their
would seem that an Internet provider that is put on notice of defamatory information being carried through its service should be liable for failing to remove it. Certainly, that is not to suggest Internet service providers should be compelled to examine every publication they carry for potentially defamatory statements. Clearly, Internet providers are not newspapers. They are not in the business of creating and reporting information. On the other hand, however, once the customer relations department has been notified that its service contains defamatory material, the Internet provider ought to be liable if it does not promptly remove it. Unfortunately, section 230(c)(1) mandates the opposite result. The net effect of section 230(c)(1) is to give free reign to the Internet companies to do whatever they please. By allowing virtually total immunity in defamation actions, section 230(c)(1) creates no incentive for Internet providers to remove defamatory material.

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97 See Siver, supra note 91, at 24 (suggesting that although "the relatively limited content of newspapers, magazines, and books is subject to editorial review before publication and distribution, online traffic is so voluminous and is distributed so quickly that much of it is not feasibly subject to editorial control"). In Smith v. California, 361 U.S. 147, 153 (1959), the Court stated that if:

Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop[,] it would be altogether unreasonable to demand so near an approach to omniscience. And the bookseller's burden would become the public's burden, for if restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed.


98 See Douglas B. Luftman, Note, Defamation Liability for On-line Services: The Sky is Not Falling, 65 GEO. WASH. L. REV. 1071, 1096 (1997) (explaining that newspapers and magazines are publishers because they solicit authors or choose a staff of writers who edit the articles for clarity and accuracy and who ultimately control the final written product). On-line services, however, rely on outsiders who are unaffiliated with the Internet provider to generate original content and have a less rigorous editorial process, if they have one at all. See id.

99 See Blumenthal v. Drudge, 992 F. Supp. 44, 52–53 (D.D.C. 1998) (holding that AOL was entitled to summary judgment in a defamation action even though they had “taken advantage of all the benefits conferred by Congress in the Communications Decency Act . . . without accepting any of the burdens”).

B. Recent Decisions Interpreting Section 230

In Zeran v. America Online, Inc., an unidentified person posted a message on an America Online ("AOL") bulletin board advertising T-shirts for sale. The advertisement claimed that the T-shirts featured "offensive and tasteless slogans" related to the 1995 bombing of the federal building in Oklahoma City. Individuals interested in purchasing the shirts were told to call "Ken" (a fictitious person) at plaintiff Zeran's home phone. As a result of this "anonymously perpetrated prank, Zeran received a high volume of calls, comprised primarily of angry and derogatory messages, but also including death threats." Zeran, who was running a business out of his home, could not change his phone number. He telephoned AOL to inform them of the situation. An AOL employee assured him that the message would be removed. The following day, an unknown person posted another message that listed Zeran's phone number and further stated that due to high demand, interested parties should "please call back if busy." These postings continued for a period of four days and resulted in phone calls to Zeran's house "approximately every two minutes." Eventually, an announcer for an Oklahoma City radio station read one of the postings over the air and "urged the listening audience to call the number." As a result, Zeran brought actions against both the radio station and AOL.

Zeran alleged negligence in his suit against AOL. He argued that because he had notified AOL of the defamatory messages, AOL had a duty to remove them promptly. The court, however, stated that "Zeran['s] attempts to artfully plead his

100 129 F.3d 327 (4th Cir. 1997).
101 See id. at 329.
102 Id.
103 See id.
104 See id.
105 Id.
106 See id.
107 See id.
108 See id.
109 Id.
110 Id.
111 Id.
112 See id.
113 See id. at 328.
114 See id. at 330.
claims as ones of negligence,” were “indistinguishable from a
garden variety defamation action” and proceeded to analyze the
case as if it were an action in defamation.\textsuperscript{115} AOL responded by
asserting section 230 of the Communications Decency Act as an
affirmative defense.\textsuperscript{116} AOL claimed that this provision “immun-
ized” it from claims based on information posted by third par-
ties.\textsuperscript{117} The Fourth Circuit agreed.\textsuperscript{118}

More recently, in \textit{Blumenthal v. Drudge},\textsuperscript{119} the D.C. Circuit
interpreted the Communications Decency Act as requiring it to
shield AOL from liability in a defamation action.\textsuperscript{120} Matt Drudge
operated the “Drudge Report,” an electronic gossip column.\textsuperscript{121} Drudge
had entered into a written agreement with AOL, who
agreed to make the “Drudge Report” available to all of its sub-
scribers.\textsuperscript{122} In exchange, Drudge received a $3000 monthly roy-
alty from AOL.\textsuperscript{123} Under the agreement, Drudge was obligated to
“create, edit, update and ‘otherwise manage’ the content of the
Drudge Report, and AOL [had the right to] ‘remove content that
AOL . . . determin[ed] to violate AOL’s . . . standard terms of
service.’”\textsuperscript{124} In August of 1997, Drudge wrote and transmitted an
edition of the “Drudge Report” that claimed that Sidney Blumen-
thal\textsuperscript{125} had a prior record of “spousal abuse . . . that ha[d] been ef-
fectively covered up.”\textsuperscript{126} The report further asserted that these
“accusations [were] explosive,” and claimed that “[t]his story
about Blumenthal ha[d] been in circulation for years.”\textsuperscript{127} As a re-

\textsuperscript{115} \textit{Id.} at 332.
\textsuperscript{116} \textit{See id.} at 330.
\textsuperscript{117} \textit{Id.}; \textit{see also} 47 U.S.C. § 230(c)(1) (Supp. III 1997) (“No provider or user of an
interactive computer service shall be treated as the publisher or speaker of any in-
formation provided by another information content provider.”).
\textsuperscript{118} \textit{See Zeran}, 129 F.3d at 330 (“By its plain language, § 230 creates a federal
immunity to any cause of action that would make service providers liable for infor-
mation originating with a third-party user of the service.”).
\textsuperscript{120} \textit{See id.} at 52–53.
\textsuperscript{121} \textit{Id.} at 47.
\textsuperscript{122} \textit{See id.}
\textsuperscript{123} \textit{See id.}
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} Sidney Blumenthal, who was formerly a journalist, is a White House aide to
President Clinton. \textit{See id.} at 46 (noting that the allegedly defamatory material was
disseminated the day before Sidney Blumenthal was to commence working at the
White House).
\textsuperscript{126} \textit{Id.}
\textsuperscript{127} \textit{Id.}
sult, Blumenthal brought suit against Matt Drudge and AOL for publishing the allegedly defamatory statements.\textsuperscript{128} AOL responded with a motion for summary judgment.\textsuperscript{129}

As a result of the constraints imposed by the Communications Decency Act, Judge Friedman reluctantly granted AOL's motion.\textsuperscript{130} The court noted, "[w]hether wisely or not,"\textsuperscript{131} Congressional judgment in enacting section 230 of the Communications Decency Act "effectively immunize[d] providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others."\textsuperscript{132} Judge Friedman explained that:

AOL is not a passive conduit like the telephone company, a common carrier with no control and therefore no responsibility

\textsuperscript{128} See id. The full report appeared as follows:
The DRUDGE REPORT has learned that top GOP operatives who feel there is a double-standard of only reporting republican shame believe they are holding an ace card: New White House recruit Sidney Blumenthal has a spousal abuse past that has been effectively covered up.

The accusations are explosive.

There are court records of Blumenthal's violence against his wife, one influential republican, who demanded anonymity, tells the DRUDGE REPORT.

If they begin to use [Don] Sipple and his problems against us, against the Republican party ... to show hypocrisy, Blumenthal would become fair game. Wasn't it Clinton who signed the Violence Against Women Act?

[There goes the budget deal honeymoon.]

One White House source, also requesting anonymity, says the Blumenthal wife-beating allegation is a pure fiction that has been created by Clinton enemies. [The First Lady] would not have brought him in if he had this in his background, assures the wellplaced [sic] staffer. This story about Blumenthal has been in circulation for years.

Last month President Clinton named Sidney Blumenthal an Assistant to the President as part of the Communications Team. He's brought in to work on communications strategy, special projects themeing—a newly created position.

Every attempt to reach Blumenthal proved unsuccessful.


\textsuperscript{129} See \textit{Blumenthal}, 992 F. Supp. at 46.

\textsuperscript{130} See \textit{id.} at 53.

\textsuperscript{131} \textit{Id.} at 49.

\textsuperscript{132} \textit{Id.}
for what is said over the telephone wires. Because it has the right to exercise editorial control over those with whom it contracts and whose words it disseminates, it would seem only fair to hold AOL to the liability standards applied to a publisher or, at least, like a book store owner or library, to the liability standards applied to a distributor. But Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others. In some sort of tacit quid pro quo arrangement with the service provider community, Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted.\(^\text{133}\)

In fact, the court explicitly stated that "[i]f it w[as] writing on a clean slate ... [it] would agree with [the] plaintiffs"\(^\text{134}\) and hold AOL liable.\(^\text{135}\) Reluctantly, however, the court stated, "[w]hile it appears ... that AOL ... has taken advantage of all the benefits conferred by Congress in the [CDA], and then some, without accepting any of the burdens ... intended, the statutory language is clear: AOL is immune from suit, and the Court therefore must grant its motion for summary judgment."\(^\text{136}\)

C. Testing the Constitutionality: The Holmes Puke Test

Consider the likelihood that section 230 of the Communications Decency Act is unconstitutional. Justice Holmes, "the great dissenter,"\(^\text{137}\) articulated the "puke test,"\(^\text{138}\) in his dissent in

\(^{133}\) Id. at 51–52 (footnotes omitted).

\(^{134}\) Id. at 51.

\(^{135}\) See id at 51–52.

\(^{136}\) Id. at 52–53 (footnotes omitted).

\(^{137}\) Thomas F. Shea, The Great Dissenters: Parallel Currents in Holmes and Scalia, 67 Miss. L.J. 397, 398 (1997) (explaining that Justice Holmes earned the title "the great dissenter" "not by the volume of his dissenting opinions, but by the fact that many of them, over the course of time, were adopted as controlling authority by new majorities of Supreme Court Justices") (quoting SAMUEL J. KONEFSKY, THE LEGACY OF HOLMES AND BRANDEIS 103 (1956)). See generally William J. Brennan, Jr., In Defense of Dissents, 37 Hastings L.J. 427, 429 (1986) (explaining that even Justice Holmes himself, today known as one of the "great dissenters," had "remarked in his first dissent on the Court that dissents are generally 'useless' and 'undesirable.'") (quoting Northern Sec. Co. v. United States, 193 U.S. 197, 400 (1904)).

\(^{138}\) Richard A. Posner, Pragmatic Adjudication, 18 Cardozo L. Rev. 1, 2 (1996) (explaining that the "puke test" is the term for the concept espoused in Holmes's dissent in Lochner where he stated that a statute does not deprive a person of liberty...
Lochner v. New York. The "puke test" is allegedly Justice Holmes's way of deciding whether or not a statute ought to pass constitutional muster. Essentially the "puke test" says, "a statute or other act of government violates the Constitution if and only if it makes you want to throw up." A person who has been degraded, trampled, chastised, morally wronged, and stigmatized by defamatory statements over the Internet and is precluded from recovery in a court of law might want to "puke" in reference to section 230. Unfortunately, however, section 230 would probably satisfy a constitutional analysis by the Supreme Court. There is at least some argument that section 230 is minimally rational. This, however, does not mean that the law should remain on the books. Congress needs to rethink the impact of section 230 on defamation actions, abolish it, and return to the common law publisher-distributor distinctions.
CONCLUSION

The Internet can be an excellent source for personal growth and educational enrichment. People throughout the world can now instantaneously communicate with one another. Children can see what a few years ago their teachers could only explain. Distanced parents, grandparents, friends, and families can reunite in cyberspace. To many, the Internet has become a medium for corporations to breathe new life into their businesses. A website allows many smaller corporations to compete within their industry at an international level.

Inside this multi-faceted prism called the Internet, however, lurks a beast that has only begun to appear. We have seen only glimpses of the defamation suits that will inevitably begin to surface. Presumably, user anonymity and Internet provider immunity are forcing attorneys to counsel their clients against bringing defamation actions. Hopefully sooner, rather than later, Congress will realize the true disservice that section 230 of the Communications Decency Act has done to private individuals who have fallen prey to a defamatory attack in Cyberspace.

Presumably, it did not take Congress much manpower to conclude that the Internet services a rapidly developing Cyber-space population. The Internet has a current audience of approximately forty million people and is expected to reach 200 million by the end of 1999. Unfortunately, however, with this development there is an increased opportunity for defamation and other tortious conduct. Congress needs to realize that it can satisfy the policies set forth in section 230 without interfering with defamation law. The only way for Congress to achieve a just result is to repeal section 230.

Eliminating section 230(c)(1) would not hinder any of the policies set forth in section 230(b). Allowing Internet providers to be treated as publishers in situations where they create or have knowledge of defamatory statements, would seem to en-

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143 See 47 U.S.C. § 230(a)(1) (Supp. III 1997) (stating that “the rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens”).


145 See 47 U.S.C. § 230(b)(1)–(5) (explaining the policies behind 47 U.S.C. § 230(c)).
hance the "development of the Internet"\textsuperscript{146} in a socially responsible manner by compelling the Internet providers to act promptly in removing defamatory material.\textsuperscript{147} Furthermore, there is little reason to believe that Congress would interfere with "the vibrant and competitive free market that presently exists"\textsuperscript{148} for Internet providers by holding them liable in certain defamation actions.\textsuperscript{149} After all, as discussed previously, we are yet to see bookstores, libraries, and newsstands closing up shop because of their potential liability in a defamation action. Nor is it rational to think Internet providers would. They, like any other industry that is prone to liability, would merely be forced to adopt practices and policies that could cope with defamation issues. As it stands today, there is little incentive—other than customer relations—for an Internet provider to act promptly in removing libelous material.

There can be no doubt that Internet providers need to assume some responsibility for the materials that pass through their services. The distributor framework appears to be the most logical solution. An Internet provider ought to be liable when it is placed on notice that it is distributing defamatory material. Anything less is simply irrational and illogical.

\textit{Robert T. Langdon}

\textsuperscript{146} 47 U.S.C. § 230(b)(1); see also David R. Sheridan, Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet, 61 ALB. L. REV. 147, 170 (1997) ("If Congress wanted to encourage removal of offensive material, why would it immunize from liability an interactive computer service that found offensive material but deliberately failed to remove it?")

\textsuperscript{147} See Craig Peyton Gaumer, Conflicts, the Constitution, and the Internet, 86 ILL. B.J. 502, 506 (1998) (explaining that the Court's decision in \textit{Reno v. ACLU} ought to stand for the proposition that the "Internet is a form of publication to which traditional forms of speech regulations (such as defamation) undoubtedly apply").

\textsuperscript{148} 47 U.S.C. § 230(b)(2).

\textsuperscript{149} See Sheridan, supra note 146, at 172 (explaining that the Internet providers probably would not be liable for large amounts of damages since they control their own services, thus, once placed on notice they have the capability to remove defamatory material quickly).